

26
AUG 16 1945

CHARLES ELMORE DEMPSEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945

No. ~~326~~ 327

GEORGE SCHWARTZ,

Petitioner,

against

UNITED STATES OF AMERICA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-
PORT THEREOF**

CHARLES D. LEWIS,
Attorney for Petitioner.

JAMES DEMPSEY,
of Counsel.



INDEX

| | PAGE |
|---|------|
| PETITION: | |
| A. Statement of the Matter Involved | 2 |
| B. The Questions Presented | 6 |
| C. Reasons Relied on for Allowance of Writ .. | 7 |
| BRIEF: | |
| POINT I—At the time it was stolen, the whiskey was no longer moving in foreign commerce and the trial court erred in not directing a verdict of acquittal and in denying petitioner's motion to set aside the verdict | 9 |
| POINT II—The judgment of conviction cannot be sustained on the theory that the variance between the indictment and the proof was immaterial | 17 |
| POINT III—The trial court's instructions to the jury constituted an abuse of judicial discretion and materially prejudiced the petitioner's right to a fair trial | 22 |
| CONCLUSION | 26 |
| APPENDIX "A" | 27 |

CASES CITED

| | |
|--|--------|
| Atlantic Coast Line Ry. Co. v. Standard Oil Co., 275 U. S. 257 | 11 |
| Berger v. U. S., 295 U. S. 78 | 22 |
| Blumenthal, et al. v. U. S., 88 F. (2d) 522 | 15 |
| Bracht v. San Antonio & A. P. Ry. Co., 254 U. S. 489 | 12 |
| Cartwright v. Wilmerding, 24 N. Y. 521 | 10, 20 |
| Chicago M. & St. Paul Ry. Co. v. Iowa, 233 U. S. 334 | 11 |
| Cline v. U. S., 20 F. (2d) 494 | 24 |
| Crawford v. U. S., 212 U. S. 183 | 25 |

| | PAGE |
|--|------------|
| Danziger, et al. v. Cooley, 248 U. S. 319 | 12 |
| Dwyer v. U. S., 17 F. (2d) 696 | 24 |
| Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1 | 19 |
| Gulf, Col. & Sante Fe Ry. Co. v. Texas, 204 U. S. 403 | 10, 11, 12 |
| Heyman v. Southern Ry. Co., 203 U. S. 270 | 12 |
| Holbrook v. Vose, 6 Bosw. (N. Y.) 76 | 20 |
| In re Talbot v. Poggi, 185 Fed. 986 | 10, 20 |
| Kalos v. U. S., 9 F. (2d) 268 | 16 |
| Keller v. U. S., 213 U. S. 138 | 19 |
| Kirmeyer v. Kansas, 236 U. S. 568 | 12 |
| Malaga v. U. S., 57 F. (2d) 822 | 25 |
| Marifian v. U. S., 82 F. (2d) 628 | 13 |
| Minner v. U. S., 57 F. (2d) 506 | 24 |
| Mottram v. Heyer, 5 Denio (N. Y.) 629 | 20 |
| Mullen v. U. S., 106 Fed. 892 | 23 |
| Murphy v. U. S., 133 F. (2d) 622 | 13 |
| Northern Pacific Ry. Co. v. Finch, et al., 225 Fed. 675 | 15 |
| O'Kelley v. U. S., 116 F. (2d) 966 | 12, 13, 14 |
| O'Shaughnessy v. U. S., 17 F. (2d) 225 | 24, 25 |
| Quercia v. U. S., 289 U. S. 466 | 16, 25 |
| Starr v. U. S., 153 U. S. 614 | 25 |
| Taney v. Penn. Natl. Bank, 232 U. S. 174 | 20, 21 |
| Texas & N. O. Ry. Co. v. Sabine Tram Co., 227 U. S. 111 | 11 |
| U. S. v. Breitling, 20 How. 252 | 23 |
| U. S. v. Di Genova, 134 F. (2d) 466 | 15 |
| U. S. v. The Erie Railroad Co., et al., 280 U. S. 98 | 11 |
| United States v. Hoke, 187 Fed. 992 | 19 |
| Welton v. Missouri, 91 U. S. 275 | 19 |
| Western Union Telegraph Co. v. Foster, 247 U. S. 105 | 11 |
| Wiborg v. U. S., 163 U. S. 632 | 25 |
| Williams v. U. S., 66 F. (2d) 868 | 25 |

OTHER AUTHORITIES CITED.

| | PAGE |
|---|----------|
| U. S. C. A. Title 18, Sect. 409 | 14, 18 |
| United States Constitution, Fifth and Sixth Amend- ments | 6, 7, 22 |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945

No.

GEORGE SCHWARTZ,

Petitioner,

against

UNITED STATES OF AMERICA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Your Petitioner, George Schwartz, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York which convicted your Petitioner of the larceny of goods moving in foreign commerce and of conspiracy to commit such larceny.

A.

Statement of Matters Involved.

I. Petitioner and four other persons, Anthony Colonna, James Alyosius Stegman, Florindo Isabella and Joseph Kaps were indicted jointly by an indictment filed in the United States District Court for the Southern District of New York on February 10, 1943 and containing two counts.

Count one charged the defendants with violating Section 409, Title 18, U. S. C. A. by stealing from a Mack truck, "beginning on or about July 1, 1942 and continuously thereafter up to and including September 30, 1942 at the Southern District of New York", 495 cases of Scotch whiskey "moving as a part of a foreign shipment of freight consigned by James Martin & Co., Ltd., Leith, Scotland, to McKesson & Robbins, Inc. at No. 111 Eighth Avenue, New York, N. Y." Count two charged a conspiracy by the defendants to meet in Hoboken, New Jersey on August 3, 1942 for the purpose of boarding a Hoboken-West Twenty-third Street ferry, holding up the Mack truck carrying the whiskey described in count one, kidnapping its drivers, stealing the whiskey and concealing it in a garage owned by the defendant Jack Kaps in Brooklyn, N. Y.

The case came on for trial before a Judge of the District Court and a jury and was tried on November 3 and 6, 1944. Petitioner alone stood trial, a severance having been obtained as to the defendant Colonna on motion of the prosecution and pleas of guilty having been taken by the other defendants. One of these defendants, James Stegman, became a witness for the prosecution and testified that Petitioner participated in the crimes charged; the other two, Florindo Isabella and Jack Kaps did not testify. It was stipulated, however, that Kaps was will-

ing to testify, but, if called, would be unable to identify the Petitioner as a participant in the crimes. On the advice of his trial counsel, Petitioner offered no evidence on his own behalf but rested on the prosecution's case.

Sentence was pronounced on all the defendants except Colonna on November 21, 1944. Petitioner was sentenced to ten years' imprisonment on the first count of the indictment and two years on the second, to run consecutively, and is now serving this sentence. The other defendants also are serving prison terms except the defendant Stegman, who received a suspended sentence.

Petitioner's conviction was affirmed by the United States Circuit Court of Appeals for the Second Circuit on July 17, 1945 by the decision now sought to be reviewed. Said decision and the opinion of the Circuit Court of Appeals are hereto annexed as Appendix A to the accompanying brief.

II. The case was tried by the prosecution and submitted by the trial court to the jury on the specific issue of Petitioner's participation in the crimes of larceny of merchandise "moving as part of a foreign shipment of freight" and of conspiracy to commit such a larceny. In its charge the trial court left to the jury to determine "if this was a theft while being transported in foreign commerce" and framed the issue as follows:

"You are to determine here if he conspired to do the acts charged by the Government. Was this merchandise being shipped from Scotland and did he steal, take and carry away with intent to steal and convert this liquor moving as part of a foreign shipment and did he conspire so to do."

The only proof in the case was the evidence offered by the prosecution. This proof was wholly undisputed and established the following facts:

James Martin & Co., Ltd., Leith, Scotland shipped 1,000 cases of Scotch whiskey under a bill of lading providing for delivery at the Port of New York running to the Manufacturers Trust Company of New York as consignee, or its assigns, and bearing the notation "Notify McKesson & Robbins, Inc., 111 Eighth Avenue, New York, N. Y." The cases were invoiced to McKesson & Robbins. Prior to the arrival of this whiskey on the steamer at Hoboken, New Jersey, McKesson & Robbins, Inc. had paid the Manufacturers Trust Company for the whiskey and the latter had assigned the bill of lading to it. McKesson & Robbins, Inc. had also paid the freight charges in full but not the customs duties and taxes on the shipment.

McKesson & Robbins, Inc. was engaged in the business of importers and wholesalers and also operated a Class 1 Bonded Warehouse of the United States Government wherein was stored in bond McKesson & Robbins' own liquors as well as the liquors of other importers. Both business enterprises were conducted at the same address, 111 Eighth Avenue, New York City.

On the morning of August 3, 1942, McKesson & Robbins, Inc. sent a Mack truck operated by two of its employees to Pier 1 in Hoboken, New Jersey, to pick up 495 cases of the whiskey and deliver them to its bonded warehouse. Previous to this date it had picked up 500 cases. This truck had been leased to McKesson & Robbins, Inc. by the Budget Transportation Company and was under the complete direction and control of McKesson & Robbins, Inc. It was a bonded truck and licensed as such in the United States Customs. Five cases of the whiskey were kept out to go into the public stores for examination by Government customs appraisers and the remaining 495 cases were delivered to McKesson & Robbins, Inc.'s representatives who turned over the bill of lading and documents showing the payment of the price and freight charges to the shipper's agents and received and accepted the whiskey and loaded it onto the truck.

The truck then proceeded to the Hoboken-West Twenty-third Street Ferry enroute to New York City and when the ferry boat had arrived at the slip in New York the drivers of the truck were held up by two armed men at the point of revolvers and were forced, after leaving the ferry to stop the truck on Eleventh Avenue, New York City, and get into an automobile in which a third robber had followed the truck from Hoboken. This third robber then drove the whiskey truck to the garage of another defendant in Brooklyn where the whiskey was unloaded.

This hold-up and "hijacking" occurred in broad daylight on a Monday afternoon in August 1942 on a crowded public ferry in a busy ferry-slip in New York City yet no person could be found to identify Petitioner as one of the participants in the hold-up except the defendant James Stegman and his brother William Stegman, both self-confessed accomplices with records of prior "hijackings", who testified for the prosecution.

Of ten other witnesses whose testimony was offered or stipulated by the Government none could identify Petitioner as a participant in any of the acts charged in the indictment.

The petitioner's guilt or innocence as an alleged participant in the theft of the 495 cases of whiskey depended entirely on the weight which the jury should attach to the credibility of these accomplices. The jury itself so stated. The trial court refused the request of Petitioner's counsel to charge that the jury "must scrutinize with special care the testimony of one who is an accomplice" and stated in its main charge:

"You have the testimony of witnesses who have criminal records. You have the right to consider that upon the question of their credibility, their criminal records. Certain witnesses are accomplices, you will scrutinize their testimony with care and caution, and give it such weight as you think it is entitled to. In

this court a defendant may be convicted on the uncorroborated testimony of an accomplice. The Government claims it was corroborated here.

One of the witnesses, James Aloysius Stegman, has pleaded guilty and is awaiting sentence, when he testified as a witness. Of course every witness expects that by testifying he is going to get a consideration. He would be entitled to consideration if he were telling the truth. In a case like this in all probability he is going to be sentenced by this Court, by myself. Is he more likely to tell the truth or an untruth when he is testifying before the Judge who is going to sentence him? Those are matters for you to consider. What is he to gain by telling the truth? What is he to gain by committing perjury in this case? Do you think it is going to help him if he commits perjury and he is going to be sentenced by this Court? Just use your common sense and reason. These are matters for your consideration."

B.

The Questions Presented.

There are three questions only presented:

(1) Did the denial of the Petitioner's motion for a directed verdict of acquittal on the ground that the whiskey, when stolen, was no longer moving in foreign commerce constitute an unlawful abdication by the trial judge of an essential common law prerogative preserved in the Federal Courts under the United States Constitution and violate the *due process of law* guarantees of the Fifth and Sixth Amendments to the United States Constitution?

(2) Can the judgment of conviction be sustained on the ground that the whiskey, when stolen, was moving in interstate commerce, without sanctioning a fatal variance between the indictment and the proof and without depriv-

ing Petitioner of the right to be informed of the nature of the accusation against him as guaranteed by the Sixth Amendment and violating the *due process of law* guarantees of the Fifth and Sixth Amendments to the United States Constitution.

(3) Did the trial court's instructions and remarks to the jury and its denial of requests to charge materially prejudice Petitioner's right to a fair and impartial trial and violate the *due process of law* guarantees of the Fifth and Sixth Amendments to the United States Constitution?

C.

The questions presented involve basic rights under the Constitution of the United States and the Articles of Amendment thereto. These rights have been affirmed frequently by this Court as fundamental, and the applicability of the provisions of the Fifth Amendment with respect to a defendant's right to an impartial trial under the guarantee of the Sixth Amendment has often been stressed. But the precise matters involved in the first two questions presented appear never to have been passed upon by this Court.

These questions are of great public interest, in that they entail consideration of the right to possession and custody of bonded merchandise held for the protection of the lien of unpaid United States Customs duties and involve the application of laws regulating commerce to movements of merchandise in bond in the United States Customs and in that they are of importance in the administration of the criminal laws in both the Federal courts and the courts of the different States of our Union and in the safeguarding of the liberties guaranteed by the United States Constitution to those accused of crime.

Your Petitioner verily believes that this application presents a case cognizable by this Honorable Court

under the Constitution and statutes of the United States and the rules of this Honorable Court, and one eminently proper for review by this Honorable Court.

Wherefore, your Petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your Petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, White Plains, New York, August 13, 1945.

CHARLES D. LEWIS,
Attorney for Petitioner.

JAMES DEMPSEY,
of Counsel.

